

Office of the Superintendent - Pension Commission

Policy Bulletin #6

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Payment of Surplus from Pension Plans

Reference: *The Pension Benefits Act Subsections 26(2)-(2.4) and the Pension Benefits Regulation Sections 4.28-4.29*

This Bulletin has been prepared to outline the legislative and related requirements regarding the payment of surplus out of pension plans in Manitoba.

LEGISLATIVE REQUIREMENTS

The Pension Benefits Act (Act) states that no funds, including surplus, can be paid out of a pension plan to an employer unless the Commission consents to the payment in writing. Subsection 26(2.1) of the Act states that the Commission shall not, under subsection (2), consent to the payment of surplus to an employer out of a pension plan, unless:

- (a) one of the following conditions is satisfied:
 - (i) the employer has demonstrated to the satisfaction of the Commission that the employer is entitled under the terms governing the plan to the surplus,
 - (ii) a judge of the Court of Kings's Bench, upon application of the employer, has determined that the employer is entitled under the terms governing the plan to the surplus,
 - (iii) the employer has made a proposal, in accordance with the Pension Benefits Regulation (regulation), to the members and other beneficiaries of the plan for the payment of the surplus, and has provided to the Commission the following written consents to the proposed payment:
 - (A) the consent of every bargaining agent who represents members in relation to the proposed payment,
 - (B) the consents of at least 2/3 of the active members, if any, who are not represented by a bargaining agent in relation to the proposed payment,
 - (C) the consents of at least 2/3 of the non-active members, if any, who are not represented by a bargaining agent in relation to the proposed payment, and
 - (D) the consents of such number or proportion, as determined by the superintendent, of the other beneficiaries who have an absolute entitlement to a pension or other benefits under the plan;

(b) all facts relevant to the payment, including the amount of the assets and liabilities of the pension plan and such other relevant information as the superintendent may require, have been disclosed to all members of the pension plan; and

(c) the employer submits a written application for the payment that contains or has attached the information required by the regulation.

For the purpose of subclause (a)(iii), "**bargaining agent**" has the same meaning as in *The Labour Relations Act*, and a bargaining agent may represent its members in relation to a proposed payment of surplus, unless the relevant collective agreement provides otherwise.

Subsection 26(2.3) of the Act states that the maximum amount of any surplus payable to an employer out of a pension plan under this section is that portion of the surplus that is in excess of:

(a) two times the total amount of the employer's current annual service contributions; or

(b) 125% of the total amount of the liabilities of the pension plan determined on the basis of factors that would apply if the pension plan were being terminated or wound up on the date of payment, less the total amount of those liabilities determined on the basis of factors applying on the assumption that the pension plan is not being so terminated or wound up;

whichever is the greater, but this subsection does not apply where the payment of surplus occurs upon the termination or winding up of the pension plan.

Subsection 26(2.4) of the Act states that if the requirements of this Act and the regulation have been met for making a payment of surplus in accordance with a proposal made under subclause (2.1)(a)(iii), the payment may be made despite the provisions of *The Trustee Act*.

Application for consent for payment of surplus to employer

Section 4.28 of the regulation states that an employer's written application for the Pension Commission's consent to a payment of surplus to the employer must be submitted to the superintendent and must set out or include the following:

(a) the amount of surplus proposed to be paid to the employer;

(b) an actuarial valuation report and cost certificate prepared in accordance with Division 2 of Part 4 of the regulation as of a review date for a period ending not more than 90 days before the date of the application that sets out the amount of surplus in the plan;

(c) if the employer is entitled under the terms of the plan to the payment, a copy of the terms of the plan that demonstrate that entitlement;

(d) if a court has determined that the employer is entitled under the terms of the plan to the payment, a copy of the court's ruling;

(e) if the employer has made a proposal under subclause 26(2.1)(a)(iii) of the Act,

(i) copies of the written consents obtained by the employer, and

(ii) a declaration by the plan administrator certifying that those consents satisfy the requirements of that subclause;

- (f) a copy of the notice given under section 4.29 and a declaration by the plan administrator certifying that the notice has been given in accordance with that section;
- (g) a declaration by the plan administrator certifying that the application complies with the Act and this regulation;
- (h) any other information requested by the superintendent.

Notice of proposed payment of surplus

Section 4.29 of the regulation states that before an employer applies for the Pension Commission's consent to a payment of surplus, the plan administrator must

- (a) prepare a written notice that sets out the following information:
 - (i) the amounts of the assets, liabilities and surplus of the plan and the date as of which those amounts were determined,
 - (ii) the amount of surplus proposed to be paid to the employer, and the amount of surplus that will remain in the plan after the payment,
 - (iii) the address of the superintendent,
 - (iv) a statement indicating that a person to whom the notice is addressed may inspect or obtain a copy of the employer's application for the payment of surplus or any accompanying document from the administrator at the administrator's office,
 - (v) if the consent of members and other beneficiaries is required by subclause 26(2.1)(a)(iii) of the Act, information about the levels of consent required and how it may be provided,
 - (vi) any other relevant information that the superintendent requires to be included in the notice; and
- (b) send the notice to each member and other beneficiary and to each bargaining agent or other association for members or other beneficiaries, or to their authorized agents, as follows:
 - (i) if the employer is entitled to the surplus under the terms of the plan, as determined by the Court of King's Bench or by the Commission, at least 30 days before the employer's application is filed with the superintendent,
 - (ii) if the consent of members and other beneficiaries is required by subclause 26(2.1)(a)(iii) of the Act, at least 90 days, and not more than 180 days, before the employer's application is filed with the superintendent.

If the consent of members and other beneficiaries is required by subclause 26(2.1)(a)(iii) of the Act, the administrator must, as soon as practicable, notify the persons to whom the notice was given under clause (1)(b) of the results of the attempt to obtain those consents.

Under the Memorandum of Reciprocal Agreement which Manitoba entered into in 1976, the legislative requirements for members in other jurisdictions must also be considered in the employer's application for the payment of surplus. Although the plan may be registered in

Manitoba, it must meet the standards of all the jurisdictions in which its employees are employed.

The administrator of a multi-jurisdictional plan should seek professional advice regarding the rules of each jurisdiction. If the administrator has any questions, they should be referred to the Office of the Superintendent – Pension Commission (OSPC). The OSPC will confer with the other jurisdictions when necessary. Some of the issues where differing rules should be considered are: which plan beneficiaries must be notified, content of notification, deadlines for notifications, and entitlement of persons whose benefits have previously been transferred from the plan.

PROCESS

It is the Pension Commission's role to ensure that:

- all necessary information is given to plan members and other beneficiaries,
- the requirements of the Act and regulation are met, and
- where the plan is not being fully terminated and wound up, it will continue to meet the solvency tests under the Act after the payment of surplus is made, and the amount of any surplus payable does not exceed the maximum as set out in the Act.

1. Determination of entitlement

It is the role of the employer, the fund holder and the members and other beneficiaries under the plan to determine surplus entitlement or the legal entitlement to a payment of surplus under the terms governing the plan.

A. Contractual rights

The employer's right to the payment of surplus out of the pension plan must be clearly set out in the terms governing the plan and consistently provide for a payment of surplus out of the plan to the employer.

To determine this right, the plan text, funding agreements and all other related documents must be reviewed thoroughly and carefully. This review must incorporate all previous plan texts which have been superseded either by reason of conversion, merger, division, and so on. It is also advisable to ask the plan's fund holders to state their position on their ability to act on a surplus refund request.

If the Commission identifies any concerns about ownership while reviewing the documentation, it will seek further clarification. Under clause 4.29(h), the superintendent is authorized to request additional information on behalf of the Commission.

If the plan clearly provides the plan members with entitlement to surplus, an application to the Pension Commission for payment to the employer will not be considered.

Further, if the language is unclear or silent, has ever been amended, or there is a dispute between the parties that cannot be resolved, the employer may wish to seek direction from the Court of King's Bench before proceeding further, or seek consent of plan members and other beneficiaries under subclause 26(2.1)(iii) of the Act.

B. Application to the court

The employer may make application to the Court of King's Bench to entitlement, or to permit a plan amendment when:

- the Pension Commission has provided written notification to the employer that it is not satisfied that the employer is entitled to surplus under the terms governing the plan,
- there is a dispute between the parties that cannot be resolved, or
- the employer considers it appropriate or advisable to do so.

Prior to the application being heard by the Court, members and other beneficiaries should be notified of the application to the Court, the nature of the application, and of their right to a copy of all or any part of the documents set out in subsection 3.31(2) of the regulation.

The OSPC should be provided with a copy of the application and all documents that have been submitted to the Court in relation to the application. This will ensure that all relevant information is being considered. Failure to provide this information to the OSPC may result in delays.

C. Member and Other Beneficiary Consent to proposal

Before the employer applies for the Pension Commission's consent, the employer may make a proposal for the payment of surplus out of the pension plan to the members and other beneficiaries in accordance with subclause 26(21.1)(a)(iii) of the Act. The employer must obtain the written consent of the parties outlined and as required by this provision, after having provided the required notice. Further, the administrator must provide the parties to whom notice was given, the results of the attempt to obtain consents.

2. Actuarial report

The actuarial report and cost certificate submitted with the employer's application under section 4.28 of the regulation must:

- (a) be prepared in accordance with Division 2 of Part 4 of the regulation,
- (b) be as of a review date for a period ending not more than 90 days before the date of the application, and
- (c) set out the amount of surplus in the plan.

3. Written Notice to Members and Other Beneficiaries

It is advisable to settle the issue of entitlement prior to the members, beneficiaries and bargaining agents or associations for members or beneficiaries receiving the required written notice.

Members, beneficiaries and bargaining agents or associations for members or beneficiaries must receive written notice of the proposed payment of surplus as outlined in subsection 4.29(1) of the regulation.

Under subclause 4.29(1)(a)(vi) of the regulation, the superintendent may require that the notice include such other information as the superintendent considers relevant. For this reason, the employer should submit a draft of the notice to the OSPC for comment prior to its distribution.

A copy of the notice that was given under section 4.29 must be included with the employer's application for the payment of the surplus, including a declaration from the plan administrator that the notice was given in accordance with this section.

Consent to the payment of surplus

The Pension Commission will review all documentation and the superintendent will request any further information the Commission considers necessary for it to satisfy itself that the requirements of the Act and regulation have been met.

Where all required documentation and information has been filed, and the Commission, in its opinion, is satisfied that all the requirements of the Act and regulation have been met, the Commission will advise the employer in writing that it consents to the payment of surplus out of the pension plan.

If you have any questions regarding this bulletin you may contact us at:

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This bulletin has no legal authority. The Pension Benefits Act of Manitoba and the Pension Benefits Regulation should be used to determine specific requirements.